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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 670

MOTORISTS MUTUAL INSURANCE COMPANY,
Appellant,

vs.

HARRY HENDERSHOT, ADMINISTRATOR OF THE ESTATE OF ANNA L. HENDERSHOT, DECEASED

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

JAMES M. HINTON,
Counsel for Appellee.

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vs.

HARRY HENDERSHOT, ADMINISTRATOR OF THE ESTATE OF ANNA L. HENDERSHOT, DECEASED,

Appellee

STATEMENT OPPOSING JURISDICTION

Statement of Facts

The record does not present for decision any substantial Federal question because any question under Section 1 of the Fourteenth Amendment has been completely foreclosed by numerous previous decisions of this Court, holding valid, statutes of other states, which the Ohio statutes in question were patterned after, and also prescribing the requirements for validity which the Ohio statutes fully meet.

The following facts which have either been omitted by appellant or not clearly stated further show appellant has not been denied protection of the Fourteenth Amendment. Clarence Ferkel, appellant's assured, came within the pur-

view of Ohio General Code Section 6308-1 as a resident of the State of Ohio who became a nonresident by leaving the State of Ohio shortly after injuring appellee's decedent by his negligent operation of a motor vehicle on a highway of the State of Ohio and also by concealing his whereabouts.

In appellee's action against Ferkel in the Common Pleas Court of Sandusky County, the county of Ferkel's former residence, the Ohio Secretary of State was duly served with process as required by Ohio General Code Section 6308-2. Also as required by the same statute within fifteen days before the return of such process a copy of the summons with an endorsement thereon was sent to Ferkel by registered mail addressed to his "last known address," 2024 Sherbourne Drive, Los Angeles, California. This address was given by him by affidavit supplied for him by appellant in another action. The Sheriff of Sandusky County made due return of his service upon the Secretary of State and that he had mailed said summons by registered mail to Ferkel at his "last known address" and attached a copy of the registered mail return receipt to his return.

The trial court regularly assigned the case for trial. As soon as appellee received notice of the trial date, it gave written notice to appellant of this and also of the service. Appellant had issued a policy by which it agreed to defend Ferkel in any such action however groundless. Under Ohio law appellee could not sue or serve appellant in such action and not until final judgment had been obtained against appellant's assured.

Upon receipt of said notice from appellee, appellant examined the file and all records of the case and elected to do nothing, in spite of its policy of insurance agreeing to defend Ferkel. Appellant could have secured a continuance but it made no request for the same. Such continuance is

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provided for by Ohio General Code Section 6308-4, which appellant has omitted and which provides as follows:

> "*Court may order continuance.* The court in which the action is pending may order such continuance as may be necessary to afford the defendant reasonable opportunity to appear and defend the action."

Appellant could also have moved to quash service of summons without entering any appearance in the action, or could have pleaded to the action on its merits.

The action was tried by the Court upon the record and evidence presented, which evidence is not a part of the record in this case because appellant did not see fit to make it a part of the record in the subsequent suit against it, which is the case out of which this appeal arises. The trial court found as a fact and upon evidence that summons had been sent to Ferkel at his "last known address" and that the Ohio service statutes had been fully complied with by appellee. The Supreme Court of Ohio in its opinion thereafter held that "whether the summons was sent to the place which was 'the last known address' is a question of fact presumably determined by the Court upon competent evidence." *Hendershot* v. *Ferkel and the Motorists Mutual Insurance Company*, 144 O. S. 112 at 117.

The trial court rendered judgment against Ferkel and the appellee again gave written notice to the appellant of this. Appellant again did nothing; the judgment became final and appellee sued appellant on its policy as provided by Ohio General Code Section 9510-4.

In this action appellant took Ferkel's deposition at San Luis Obispo, California, and was apparently at all times fully advised of Ferkel's whereabouts although it had offered no information about this to appellee when appellee gave it the aforesaid notices and did not gainsay that his "last known address" was the one which they had fur-

nished by his affidavit. Ferkel disclosed in this deposition that he had left the address given in his affidavit without leaving any mail forwarding address, had moved about the states of the west without any regular place of residence, had kept his whereabouts concealed and had received mail which he cared to receive at places other than where he was living.

The trial court rendered judgment against appellant upon its policy of insurance and upon appeal the Ohio Supreme Court affirmed such judgment in case No. 29705 of said Court on August 19, 1944, and remanded the case to the Court of Appeals for further proceedings. In this case the constitutional questions raised by the appellant were fully disposed of. Subsequently, July 24, 1945, in case No. 30590, the Supreme Court of Ohio again affirmed the judgment of the Common Pleas Court. In its opinion under the latter judgment, the Ohio Supreme Court made no rulings upon the constitutional questions raised by appellant because it had fully determined those by its judgment of August 19, 1944, in the former action before it. In its opinion rendered August 9, 1944, *Hendershot* v. *Ferkel*, 144 O. S. 112 (Syl. 3), the Ohio Supreme Court decided:

> "2. Section 6308-2, General Code, providing in substance that process shall be served by the officer to whom directed or by the sheriff of Franklin county, upon being deputized, upon the Secretary of State of Ohio and by sending to the defendant by registered mail, postage prepaid, a like, true and attested copy thereof with an endorsement thereon of the service upon said Secretary of State, addressed to such defendant at his last known address and that 'The registered mail return receipt of such defendant shall be attached to and made a part of the return of service of process' makes it reasonably certain that such notice will be received by the defendant and does not require actual delivery of the notice to give the court

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jurisdiction in the cause, and is not constitutionally invalid."

No Federal Question Presented

The only Federal question suggested by appellant is whether the Ohio statutes contravene Section 1 of the Fourteenth Amendment of the Constitution of the United States. Any question of the validity of the Ohio statutes is completely foreclosed by numerous previous decisions of this Court and we have accordingly filed a motion to dismiss this appeal or to affirm the judgment of the Supreme Court of Ohio.

The Ohio courts found appellee fully complied with the Ohio statutes. This was a question of fact and construction and presents no Federal question there being evidence to support the state court findings. *Waters Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 29 S. Ct. 220, 53 L. Ed. 417; *Great Northern Railway Co.* v. *Donaldson*, 246 U. S. 121, 38 S. Ct. 230, 62 L. Ed. 616; *Anglo-Chilean Nitro Sales* v. *Alabama*, 288 U. S. 218, 53 S. Ct. 373, 77 L. Ed. 710; *King* v. *West Virginia*, 216 U. S. 92, 30 S. Ct. 225, 54 L. Ed. 396; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 62 S. Ct. 766, 86 L. Ed. 1031.

In *Kane* v. *New Jersey*, 242 U. S. 160, 37 S. Ct. 30, 61 L. Ed. 222, this Court affirmed a decision of the Court of Error and Appeals of New Jersey, holding that a New Jersey statute (almost identical with the Ohio statute) providing for notice to the defendant by letter directed to him at the post office address stated by him in an application for license did not violate Section 1 of the Fourteenth Amendment.

This case was decided December 4, 1916, and this Court there said:

"The power of a state to regulate the use of motor vehicles on its highways has been recently considered

by this Court and broadly sustained. It extends to nonresidents as well as to residents."

(61 L. Ed. at 227.)

In *Hess* v. *Pawloski*, 274 U. S. 352, 71 L. Ed. 1091, 47 S. Ct. 632, this Court upheld a Massachusetts statute (again almost identical with the Ohio statute) which provided for notice to the defendant by mailing the process to him by registered mail.

The requirement of the Ohio statute is even more rigid and specifies mailing to defendant's "last known address."

In *Wuchter* v. *Pizzutti*, 276 U. S. 13, 48 S. Ct. 259, 72 L. Ed. 446, 37 A. L. R. 1230, this Court approved both of the foregoing cases In that case, this Court had before it another statute which contained no provision for notifying the defendant and only required service upon the Secretary of State. This Court held in that case that such statute violated Section 1 of the Fourteenth Amendment of the United States as a denial of due process.

The requirement of Section 1 of the Fourteenth Amendment as to such statute is given by Chief Justice Taft, after citing numerous cases, as follows:

(72 L. Ed. at 451, 276 U. S. at 24)

"These cases and others indicate a general trend of authority towards sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is a reasonable probability that if the statutes are complied with the defendant will receive actual notice, and that is the principle which we think should apply here."

(See also Syl. 2.)

The same rule has been reiterated by this Court in the case of *Henry L. Doherty & Co.* v. *Goodman*, 294 U. S. 623

at 628, 79 L. Ed. 1097, 55 S. Ct. 553, in the following language of the opinion:

> "The power of the states to impose terms upon nonresidents, as to activities within their borders, recently has been much discussed. *Hess* v. *Pawloski*, 274 U. S. 352; *Wuchter* v. *Pizzutti*, 276 U. S. 13; *Young* v. *Masci*, 289 U. S. 253 (77 L. Ed. 1158, 53 S. Ct. 599, 88 A. L. R. 170). Under these opinions it is established doctrine that a state may rightly direct that nonresidents who operate automobiles on her highways shall be deemed to have appointed the Secretary of State as agent to accept service of process, provided there is some 'provision making it reasonably probable that notice of the service on the Secretary will be communicated to the non-resident defendant who is sued.' "

Also in *Washington* v. *Superior Court of Washington*, 289 U. S. 361, 77 L. Ed. 1256, 53 S. Ct. 624, 89 A. L. R. 653

Appellants are claiming, quite contrary to the decisions of this Court, that it is a denial of due process unless the defendant receives actual notice This Court has held that its only concern has been the terms of the state statutes, that it is not necessary that the defendant receive actual notice, and that matter has made no difference under the decisions of this Court. In *Wuchter* v. *Pizzutti* (Syl. 4), the defendant received actual notice, but the Court held the statute invalid and the service void because the statute made no provision for any kind of notice to the defendant. In *Hess* v. *Pawloski*, no personal service was made on the defendant yet this Court held the statute valid because it contained a reasonable provision for notifying him.

The Ohio statutes contain provisions for notifying the defendant, which make it "reasonably probable" that the defendant will receive actual notice and therefore under the decisions of this Court do not violate Section 1 of the Fourteenth Amendment.

The Ohio Supreme Court carefully followed the decisions of this Court, and in that connection we respectfully refer this Court to the portions of the opinion of the Ohio Supreme Court, 144 O. S., 112 at pages 118 and 119. (Case No. 29705—August 9, 1944, P. 5 of copy of Opinion attached to Appellant's Jurisdictional Statement.)

There are many kinds of proper service in which the defendant may not receive actual notice and which meet the requirements of due process; for instance, ordinary residence service in an action in a court of a county in which defendant is a resident. Other instances are given by the Ohio Supreme Court in its opinion to which reference is respectively made for illustration, 144 O. S. at 119 and 120. (Case No. 29705—August 9, 1944, P. 5 and 6 of copy of Opinion attached to Appellant's Jurisdictional Statement.)

To hold, as contended by the defendant, that due process requires that the defendant receive actual notice, would deprive the statutes in question of all effectiveness and invite fraud. A defendant would need only refuse the mail or conceal his whereabouts and mailing address as the defendant did in this case. We fail to find any justification offered by appellant in its jurisdictional statement for its second and third assignments of error and therefore make no reference to the same.

It would seem that any question under the Fourteenth Amendment, either as respects the act or the proceedings, is foreclosed by previous decisions of this Court and is so unsubstantial and frivolous as to justify the motion to affirm, if not the motion to dismiss. *Leonard* v. *Vicksburg, etc., Railroad Co.*, 198 U. S. 416, 25 S. Ct. 750, 49 L. Ed. 1108 (Syl. 2); *Boston* v. *Jackson*, 260 U. S. 209, 43 S. Ct. 129, 67 L. Ed. 274—at 260 U. S. 314, 67 L. Ed. 282; *Equitable Life*

Assurance Co. v. *Brown*, 187 U. S. 308, 23 S. Ct. 123, 47 L. Ed. 190—187 U. S. 311, 47 L. Ed. 192; *King* v. *West Virginia*, 216 U. S. 92, 30 S. Ct. 225, 54 L. Ed. 396—at 216 U. S. 100, 54 L. Ed. 401.

Respectfully submitted,

JAMES M. HINTON,
Counsel.

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Appellee

MOTION TO DISMISS OR AFFIRM

Now comes the appellee, Harry Hendershot, Administrator of the Estate of Anna L. Hendershot, deceased, and moves to dismiss the appeal herein on the ground that the case presents no substantial Federal question, and further moves, if the motion to dismiss is not granted, that this Court affirm the decision of the Ohio Court on the ground that the questions on which the decision of this Court depends are so unsubstantial as to need no further argument, all as appears in the Statement of Grounds Making Against the Jurisdiction of this Court filed herewith.

Respectfully submitted,

JAMES M. HINTON,
Counsel.